

JACK E. CARRINGTON

IBLA 83-825

Decided June 12, 1984

Appeal from decision of Nevada State Office, Bureau of Land Management, declaring mining claims null and void ab initio. N MC 261896 and N MC 262508.

Reversed.

1. Mining Claims: Tunnel Sites -- Mining Claims: Withdrawn Land

The Act of July 25, 1866, 14 Stat. 242, which granted a right-of-way for construction of a tunnel and a right to purchase lodes within 2,000 feet from each side of the tunnel discovered by constructing the tunnel, did not segregate the surface of the land from mineral location. A Bureau of Land Management decision declaring a lode mining claim located within 2,000 feet of the tunnel right-of-way null and void ab initio will be reversed.

APPEARANCES: Jack E. Carrington, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Jack E. Carrington has appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated July 18, 1983, declaring the Silver Star and Silver Star #1 mining claims, N MC 261896 and N MC 262508, null and void ab initio.

Appellant's mining claims were located December 5, 1982, and recorded with BLM on February 22, 1983 (N MC 261896) and March 2, 1983 (N MC 262508), pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1982), and 43 CFR 3833.1-2(b) (1982). In its July 1983 decision, BLM declared the mining claims null and void ab initio because they were located "within 2,004 feet" of the center line of the Sutro tunnel in sec. 33, T. 17 N., R. 21 E., Mount Diablo meridian, Storey County, Nevada, which land had been "segregated" from mineral entry by the Act of July 25, 1866, 14 Stat. 242.

Under the Act of July 25, 1866, supra, Congress granted a right-of-way to "A. Sutro, his heirs and assigns" for the purpose of constructing a "deep

draining and exploring tunnel to and beyond the 'Comstock lode.'" ^{1/} The tunnel was to be 8 feet wide. In addition, section 2 of the Act of July 25, 1866, supra, provided that:

And the said A. Sutro, his heirs and assigns, are hereby granted the right to purchase, at five dollars per acre, such mineral veins and lodes within two thousand feet on each side of said tunnel as shall be cut, discovered, or developed by running and constructing the same, through its entire extent, with all the dips, spurs, and angles of such lodes, subject, however, to the provisions of this act, and to such legislation as Congress may hereafter provide.

Congress excepted from the grant of the purchase right the Comstock lode and all other lodes that were in the "actual bona fide possession of other persons," at the date of passage of the Act. 14 Stat. at 243.

In his statement of reasons for appeal, appellant contends that the Silver Star mining claim is a placer mining claim and that, therefore, it is not affected by the Act of July 25, 1866, supra, which granted a purchase right as to "mineral veins and lodes." Appellant also argues that, while the Silver Star #1 mining claim is a lode mining claim, the subject land is "open for development" because of the passage of 117 years and the fact that the successors of A. Sutro forfeited their rights by abandoning the Sutro tunnel.

There is no question in the record that appellant's mining claims were located within 2,004 feet of the center line of the Sutro tunnel and, thus, might be subject to the right to purchase granted by the Act of July 25, 1866, supra.

[1] In Intermountain Exploration Co., 76 IBLA 349 (1983), we reviewed a BLM decision which declared a lode mining claim null and void ab initio because it lay within land "segregated" from mineral entry by the Act of July 25, 1866, supra. We held that, while noted on the land status plat, the Act did not segregate the land, but only granted the successors of A. Sutro "rights to lodes of a specific length." (Emphasis added). Intermountain Exploration Co., supra at 351. Moreover, we noted that while surface locations on the line, or width of the bore, of the tunnel were prohibited, surface locations not on the line were "at the peril of the locator because they

^{1/} The purposes of the tunnel right-of-way were further explained in Symmes v. Union Trust Co., 60 F. 830, 837 (D. Nev. 1894):

"That the main objects of the Sutro tunnel were to drain the mines on the Comstock lode, to give ventilation, to transport ore through it from the mines to the mills (and incidentally to transport waste rock to and beyond the mouth of the tunnel, and to transport men, material, and machinery to and from the mines), and to explore, through a vast network of underground tunnels and drifts, the whole mineral belt from the mouth of the tunnel to and about and beyond the Comstock lode."

would be subject to divestment upon the discovery of the same vein in the tunnel," relying on interpretations of section 4 of the Act of May 10, 1872, 30 U.S.C. § 27 (1982), known as the Tunnel Site Act. Id. at 352. We concluded that: "If the same analysis were applied to the Sutro tunnel, appellant's claim would be simply subject to Sutro's prior rights to those veins and lodes cut, discovered or developed by running and cutting the Sutro tunnel, not null and void ab initio as found by BLM." Intermountain Exploration Co., supra at 352. Accordingly, we reversed the BLM decision. We consider that rationale to be controlling in this case. Thus, BLM improperly declared appellant's mining claims null and void ab initio. The claims, rather than being null and void ab initio, would merely be subject to Sutro's prior rights, if any. 2/ See Comstock Tunnel & Drainage Co., 79 IBLA 237 (1984).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

2/ In light of our disposition, it is unnecessary to decide what rights, if any, remain in A. Sutro's heirs after the passage of 117 years from the grant of the right-of-way.

